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NO. 954

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

JAMES WILLIAMS,

Petitioner

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

SAM ADAM
134 N. LaSalle Street
Chicago, Illinois
CEntral 6-5543

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James Williams.

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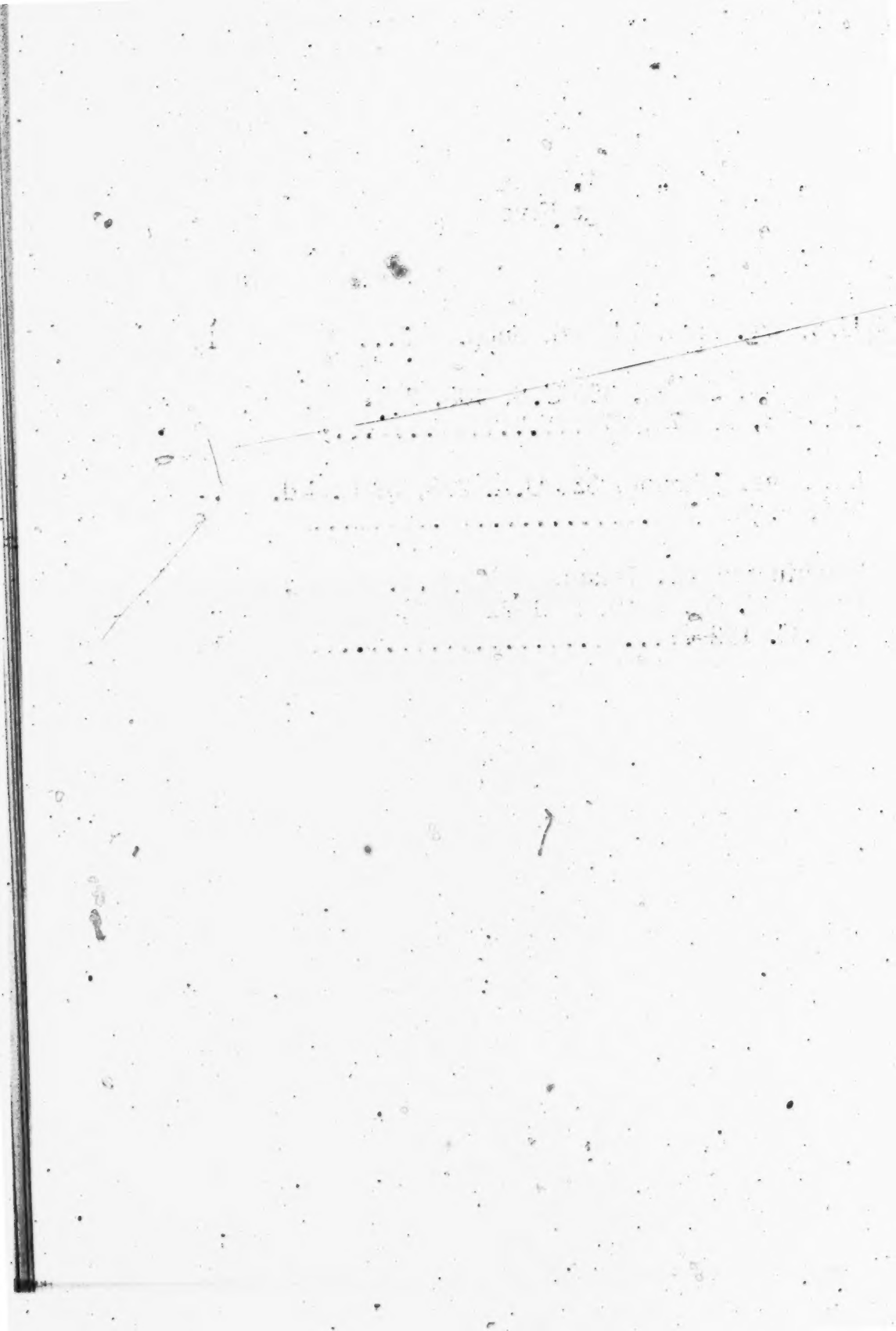

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JAMES WILLIAMS,

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF ILLINOIS

TO THE HONORABLE, CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

OPINION BELOW

In the Municipal Court of Chicago, First Municipal District of the Circuit Court of Cook County, Illinois, on January 7, 1965, petitioner was found guilty by the court of carrying a dangerous knife, in violation of Chapter 38, Section

24-1 (a) (2), Illinois Revised Statutes "in manner and form as charged in the complaint." (R.43). Judgment was entered on said finding and petitioner was "sentenced to confinement at labor" in the House of Correction at Chicago, Illinois for a period of three months. (R.44). No opinion was rendered by the trial court.

The Appellate Court of Illinois, First District, Second Division, over the dissent of Mr. Justice John J. Lyon, on April 12, 1966 affirmed said judgment and sentence. (R.66). On June 9, 1966, that court denied the Petition for Rehearing, but rendered a supplemental opinion. (R.71). The majority and dissenting opinions and the supplemental opinion on rehearing are reported in 69 Ill. App. 2d. 55, 216 N.E. 2d. 468, and are appended hereto, Appendix 6-16.[1]

On September 22, 1966, petitioner's Petition for leave to Appeal from the aforesaid judgment of the Appellate Court of Illinois, First District, Second Division, which affirmed petitioner's aforesaid judgment and sentence,to the Supreme

---

1. This majority opinion, in the case at bar, states, 216 N.E. 2d. 468, P. 472, "We are aware that this opinion is not in accord with that handed down by another division of this district, People vs. Hill, Gen. No. 50343, 68 Ill. App. 2d. 369, 216 N.E. 2d. 212, filed February 3, 1966, ***". The HILL opinion referred to is attached hereto, Appendix 17-23.

Court of Illinois was granted. (R. 76). On May 18, 1967, the Supreme Court of Illinois in an opinion, (R. 99-101), affirmed said judgment. (R. 102). The opinion of the Supreme Court of Illinois is reported in 229 N. E. 2d. 495, and is appended hereto, Appendix 1-5.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Supreme Court of Illinois, here sought to be reviewed, was rendered on May 18, 1967. The Petition for Rehearing was denied on September 27, 1967. (R. 110).

This Court's jurisdiction is conferred by Title 28, Section 1257 (3), United States Code.

QUESTIONS PRESENTED

Is not the constitutional right of an accused in a criminal prosecution to be tried in "the State where the said crimes shall have been committed", guaranteed by Article III, Section 2, Clause 3 and the Sixth Amendment to the Constitution of the United States, enforcible and guaranteed against invasion by the State through the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

Is not the right to be tried where the offense is committed implicit in the concept of ordered liberty and a requirement of fundamental fairness reflected in and assured by the Due Process Clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Article III, Section 2, Clause 3:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed."

Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ILLINOIS CONSTITUTION

Article 2, Section 9:

"In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compell the attendance of witnesses in his behalf, and a speedy public trial by an impartial

jury of the county or district in which the offense is alleged to have been committed."

STATEMENT OF THE CASE

The complaint, (R.42), filed in the Municipal Court of Chicago, First Municipal District of the Circuit Court of Cook County, Illinois, on January 7, 1965, alleged that petitioner "on or about January 6, 1965 at 900 S. Winchester, committed the offense of unlawful use of weapon, in that he carried a dangerous knife concealed in his boot with the intent to use the knife unlawfully against another, in violation of Chapter 38, Section 24-182, Illinois Revised Statutes, and against the peace and dignity of the People of the State of Illinois." The complaint did not allege in what State, city, town, village, county, or where the offense was committed. Nor did the complaint allege that the offense was committed within the jurisdiction of the court in which the complaint was filed. Petitioner was found guilty by the court "in manner and form as charged in the complaint," and sentenced to three months imprisonment at labor in the House of Correction at Chicago, Illinois.

The Illinois Supreme Court's opinion states and holds, (R.99-101), (App. 1-5), 229 L. Ed. 2d. 495, 496-497:

"Section 9 of article II of the constitution of Illinois guarantees a defendant the right to be tried in 'the county or district in which the offense is alleged to have been committed.' The only allegation as to the place of the offense in the body of this complaint is that it occurred at '900 S. Winchester.' No city or county is named in the body of the complaint, although the complaint was verified in Cook County and there are other references to that county and its circuit court. ***

* * *

"***we see no reason to refuse to read the caption as part of the complaint. So read, the complaint sufficiently designates the county in which the offense was alleged to have been committed."

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

An accused's constitutional right, provided by Article III, Section 2, Clause 3 and the Sixth Amendment to the Constitution of the United States, to be tried "in the State where the said crimes shall have been committed" is guaranteed

against invasion by the State through the Due Process Clause of the Fourteenth Amendment, and is a right implicit in the concept of ordered liberty, and is required by fundamental fairness reflected in due process.

This Court held in U.S. vs. Johnson, 323 U.S. 273, 89 L. Ed. 236, P. 238-239:

> "Aware of the unfairness and hardship to which trial in an environment alien to the accused exposes him, the framers wrote into the Constitution that 'the trial of all crimes*** shall be held in the State where the said crimes shall have been committed. ***' Article 3, Section 2, Cl. 3. As though to underscore the importance of this safeguard, it was reinforced by the provisions of the Bill of Rights requiring trial 'by an impartial jury of the State and district wherein the crime shall have been committed.' Sixth Amendment. ***'
>
> "***Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure."

In Johnston vs. U.S., 351 U.S. 215, 100 L. Ed. 1097, P. 1102, this Court held:

> "Article 3 of the Constitution and the Sixth Amendment fixed venue 'in the State' and 'district wherein the crime shall have been

committed'. The venue of trial is thereby predetermined, ***. That place is determined by the acts of the accused that violate a statute. This requirement of venue states the public policy that fixes the situs of the trial in the vicinage of the crime. ***"

This Court held in U.S. vs. Cores, 356 U.S. 405, 2 L. Ed. 2d. 873, P. 875-876, and restated said holding in Platt vs. Minnesota Minning and Manufacturing Co., 376 U.S. 240, 11 L. Ed. 2d. 674, P. 679:

> "The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed. *** The provision for trial in the vicinity of a crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place."

In Travis vs. U.S., 364 U.S. 631, 5 L. Ed. 340, P. 343-344, this Court held:

> "We start with the provision of Article 3, Section 2 of the Constitution that criminal trials 'shall be held in the State where the said crimes shall have been committed,' a safeguard reinforced by the command of the Sixth Amendment that the criminal

> trials shall be before an impartial jury of 'the State and district wherein the crime shall have been committed.'*** We therefore begin our inquiry from the premise that questions of venue are more than matters of mere procedure. 'They raise deep issues of public policy***"

This Court stated in Beavers vs. Henkel, 194 U.S. 83, 48 L. Ed. 882, P. 886:

> "The locality in which an offense is alleged to have been committed determines, under the Constitution and laws, the place and court of trial."

We invite this Court's attention to Holdridge vs. U.S., 282 Fed. 2d. 302; U.S. vs. Bink, 74 Fed. Supp. 603; Bratton vs. U.S., 73 Fed. 2d. 795; Moran vs. U.S., 264 Fed. 768; Brightman vs. U.S., 7 Fed. 2d. 532, in which it is held that venue in a criminal case is a matter of constitutional right which forbids an indictment, a trial and a conviction in a criminal case in any State or district except where the crime was committed. And see U.S. vs. Anderson, 328 U.S. 699, 90 L. Ed. 1529, P. 1533.

The complaint in the case at bar did not allege where the offense was committed, or that it was committed within the jurisdiction of the court in which the complaint was filed, or in what State, county, city, town or village the offense was committed. In an identical and companion case, People vs. Hill, 68 Ill. App. 2d. 369, 216 N.E. 2d. 212, (App. 17-23), decided on February 3, 1966, by the Appellate Court of Illinois, Third Division, First District, the same District,which decided the case at bar, but another division thereof, that Court stated, 216 N.E. 2d. 212, P. 214, (App. 18):

> "The complaint is defective in several particulars, some of which go far beyond formal technicalities or niceties of pleadings. The most flagrant defect is that venue is not alleged. The complaint does not say in what city, county or State the offense was committed. A defendant has a constitutional right to be tried in the county in which the offense is alleged to have been committed." (Emphasis ours).

The Supreme Court of Illinois did not meet, answer or decide this constitutional law question in the case at bar, but rather, decided that the complaint's mere recitation that the court in which the complaint was filed was in Cook County, Illinois,

was sufficient, even though the complaint did not allege that the offense occurred within the court's jurisdiction or where the offense occurred. With all due deference and respect to the distinguished Supreme Court of Illinois, the Court's reasoning is spurious. The trial court's identity and location and the situs of an offense are as far removed from one another as east is from west. The fundamental constitutional right and safeguard to be tried where the offense was committed cannot be so ludicrously rejected or so slight handedly circumvented.

This Court has held, (1) that the United States Fourth Amendment constitutional right of privacy is "enforcible against the States through the Due Process Clause of the Fourteenth" Amendment; Mapp vs. Ohio, 367 U.S. 643, 655, 6 L. Ed. 2d. 1081; 1090, 81 S. Ct . 684; Stanford vs. Texas, 379 U.S. 476, 13 L. Ed. 2d. 431; Ker vs. Cal., 374 U.S. 23, 10 L. Ed. 2d. 726; (2) that the United States Sixth Amendment constitutional right of an accused to counsel is obligatory upon the States by the Due Process Clause; Gideon vs. Wainwright, 372 U.S. 335, 9 L. Ed. 2d. 799, 83 S.C. 792; (3), that the United States Sixth Amendment constitutional right of an accused "to be confronted with the witnesses against him" is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment." ; Pointer vs. Texas, 380 U.S. 400, 13 L. Ed. 2d. 923, P. 926; Douglas vs. Alabama, 380 U.S. 415, 13 L. Ed. 2d. 934, P. 937;

(4); that the United States Fifth Amendment constitutional privilege against self-incrimination is applicable and made binding upon the States by the Fourteenth Amendment; Malloy vs. Hogan, 378 U.S. 1, 12 L. Ed. 2d. 653, P. 656; Murphy vs. Waterfront Commission of New York, 378 U.S. 52, 12 L. Ed. 678, P. 694; (5),that the United States Eighth Amendment constitutional prohibition against "cruel and unusual punishments" is imposed upon the States by the Fourteenth Amendment; Robinson vs. California, 370 U.S. 660, 8 L. Ed. 2d. 758, P. 763; (6), that an accused's United States Sixth Amendment constitutional right to have compulsory process for obtaining witnesses in his favor is incorporated in the Due Process Clause of the Fourteenth Amendment and obligatory upon the States; Washington vs. Texas U.S. , 18 L. Ed. 2d. 1019, P. 1022-1023, 87 S. C. 1920; (7), that the United States Sixth Amendment constitutional right of an accused to a speedy trial is binding upon the States through the Due Process Clause of the Fourteenth Amendment; Kolpfer vs. N.C. 386 U.S. 213, 18 L. Ed. 2d. 1, P. 7-8. For other rights guaranteed by the First Eight Amendments to the Constitution of the United States that are made binding upon the States by the Fourteenth Amendment, we invite the Court's attention to the opinion of Mr. Justice Brennan speaking for a majority of the Court in New York Times vs. Sullivan, 376 U.S. 254, 11 L. Ed. 2d. 686; the concurring opinion of Mr. Justice Goldberg in Pointer vs. Texas, 380 U.S. 400, 13 L. Ed. 2d. 923, P. 930-933; the opinion of Mr. Justice Brennan

on behalf of a majority of the Court in Malloy vs. Hogan, 378 U.S. 1, 12 L. Ed. 2d. 653, P. 657-658, footnote 4, and the dissenting opinion of Mr. Justice Brennan in Cohen vs. Hurley, 366 U.S. 117, 6 L. Ed. 2d. 156, P. 179-183. We here ask this Court to grant this Petition for Writ of Certiorari to determine the heretofore undecided question of whether the United States Sixth Amendment constitutional right to be tried at the place "wherein the crime shall have been committed" is made obligatory upon the States by the Fourteenth Amendment.

The failure of a charge to allege where an offense was committed, or in what county, district or State the offense was committed, or that the offense was committed within the court's jurisdiction, presents inherent subsidiary questions of the constitutional right against being twice placed in jeopardy for the commission of the same offense, and trial by "jury of the State and district wherein the crime shall have been committed," and "to be informed of the nature and cause of the accusation." If the situs of the offense is not alleged, how then can an accused's constitutional right to be tried by a jury, selected from the State or district in which the offense occurred, be exercised? How can an accused plead or prepare a defense to such charge? It may be that he is guilty of the alleged offense in Wisconsin but not guilty of the commission of such alleged

offense in Illinois. In the absence of an allegation of the situs of the offense, how can an accused plead an acquittal or conviction thereof as a bar to subsequent proceedings brought against him for the commission of the same offense? Thus, in the absence of an allegation of the situs of the offense, the constitutional rights of an accused not to be twice placed in jeopardy for the commission of the same offense, to be informed of the nature and cause of the accusation and to trial by jury are grossly infringed upon, circumvented and indeed violated. We pray that this Petition be granted.

Respectfully prayed,

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CE 6-5543

The PEOPLE of the State of Illinois,
Appellee,

v.

James WILLIAMS, Appellant.

Gen. No. 40085

229 N. E. 2d 495

Supreme Court of Illinois

May 18, 1967

Rehearing denied Sept. 27, 1967.

SCHAEFER, Justice

A complaint filed in the circuit court of Cook County charged the defendant James Williams, with the offense of unlawful use of weapons. (Ill. Rev. Stat. 1965, chap. 38, par. 24-1 (a) (2).) He waived a jury trial, was tried before the court, found guilty, and sentence to imprisonment for three months. The second division of the Appellate Court, First District, affirmed the conviction, (69 Ill. App. 2d 55, 216 N. E. 2d 468) thus reaching a result contrary to that which had been reached by the third division of that court in People v. Hill, 68 Ill. App. 2d 369, 216 N. E. 2d 212.

The defendant's sole contention is that the complaint is void because it did not allege the county

in which the offense was committed. The complaint is as follows:

"JOSEPH J. McDONOUGH, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

STATE OF ILLINOIS) ss. THE CIRCUIT COURT
COUNTY OF COOK) OF COOK COUNTY
NO.

COMPLAINT

GENE MOTYKA, complainant, now appears before the Circuit Court of Cook County and in the name and by the authority of the People of the State of Illinois states that JAMES WILLIAMS has on or about Jan. 6, 1965 at 900 S. Winchester committed the offense of UNLAWFUL USE OF WEAPONS in that he carried a dangerous knife concealed in his boot with the intent to use said knife unlawfully against another, in violation of Chapter 38 Section 24-1A2 ILLINOIS REVISED STATUTE AND AGAINST THE PEACE AND DIGNITY OF THE PEOPLE OF THE STATE OF ILLINOIS.

(signed) Gene Motyka

STATE OF ILLINOIS) SS
COUNTY OF COOK)

GENE MOTYKA being duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

(signed) Gene Motyka."

(The italicized portions were inserted by typewriter on the printed complaint form.)

Section 9 of Article II of the constitution of Illinois guarantees a defendant the right to be tried in "the county or district in which the offense is alleged to have been committed." The only allegation as to the place of the offense in the body of this complaint is that it occurred at "900 S. Winchester." No city or county is named in the body of the complaint, although the complaint was verified in Cook County, and there are other references to that county and its circuit court. The defendant does not contend that the venue was in fact improper, that it was not adequately proved, or that he was in any way prejudiced by the failure to allege in the body of the complaint the county in which the offense was committed. The record does not suggest that the contention advanced upon appeal was in any presented to the trial court.

This court has held that the county in which the offense is alleged to have been committed must be stated in an indictment with sufficient precision that the court may see that it has jurisdiction of the offense. (People v. Strong, 363 Ill. 602. 2N.E. 2d 942.) In this respect, venue has been regarded as a matter of substance, and has been given a jurisdictional cast. People v. Powell, 353 Ill. 582, 187 N.E. 419,) While the formal requirements governing proof of venue have been relaxed (People v. Pride

16 Ill. 2d 82, 156 N. E. 2d 551; People v. Allen, 413 Ill. 69, 107 N. E. 2d 826; People v. Long, 407 Ill. 210, 95 N. E. 2d 461), the requirements governing itsallegation apparently remain unaltered.

If we look at the entire complaint in t his case, the conclusion seems unmistakable that the complainant is describing an event that took place in Cook County. (Cf. People v. Pride, 16 Ill. 2d 82, 156 N. E. 2d 551) Only by consciously refusing to look at the numerous references to that county, and concentrating solely upon the fact that the designation of that county does not follow the street address, it is possible to engender doubt. But we are not confined by precedent to a focus so narrow. It has indeed been held that defects in the caption do not invalidate an indictment (People v. Sellers, 30 Ill. 2d 221, 196 N. E. 2d 481,) and that in cases of variance between the caption and the body of an indictment it is the body that controls. And in that context it has been said that the caption is no part of the indictment. (People v. Shaw, 300 Ill. 451, 133 N. E. 208; George v. People, 167 Ill. 447, 47 N. E. 741.) On the other hand Duncan v. People, 2 Ill. (1 Scam.) 456, seems to suggest that a deficiency in a court of an indictment may be supplied by reference to the caption. In any event we are not aware of any decision of this court holding that the caption of a charging document must be ignored when there is no conflict between the caption and the body of the complaint.

Where, as in this case, there is no conflict between the caption and the body of the charge, no suggestion that the venue was improper or improperly proved, and no showing of prejudice to the defendant, we see no reason to refuse to read the caption as part of the complaint. So read, the complaint sufficiently designates the county in which the offense was alleged to have been committed.

The other contention raised by the defendant was properly disposed of by the appellate court, and need not be discussed. The judgment of the appellate court is affirmed.

Judgment affirmed.

WARD, J., took no part in the consideration or decision of this case.

PEOPLE of the State of Illinois,
Plaintiff-Appellee,

v.

James WILLIAMS, Defendant-Appellant.

Gen No. 50323.

216 N.E.2d 468
69 Ill.App.2d 55

Appellate Court of Illinois.
First District, Second Division.
April 12, 1966
On Rehearing June 9, 1966.

BRYANT, Presiding Justice.

This is an appeal from a finding and judgment entered in the Circuit Court of Cook County, January 7, 1965 wherein the appellant was found guilty of unlawful use of a weapon in violation of Ill. Rev. Stat. 1963, Chap. 38, sec. 24-1. The sole point raised in this appeal is that the complaint was defective in that venue was not alleged. The complaint is as follows:

JOSEPH J. McDONOUGH, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

STATE OF ILLINOIS) ss. THE CIRCUIT COURT
COUNTY OF COOK) OF COOK COUNTY

NO.
COMPLAINT

GENEMOTYKA, complainant, now appears before the Circuit Court of Cook County and in the name and by the authority of the People of the State of Illinois states that JAMES WILLIAMS has, on or about Jan. 6, 1965 at 900 S. Winchester committed the offense of UNLAWFUL USE OF WEAPONS in that he carried a dangerous knife concealed in his boot with the intent to use said knife unlawfully against another, in violation of Chapter 38 Section 24-1A2 ILLINOIS REVISED STATUTE AND AGAINST THE PEACE AND DIGNITY OF THE PEOPLE OF THE STATE OF ILLINOIS.

(s) Gene Motyka
(Complainant)

STATE OF ILLINOIS)
COUNTY OF COOK) SS

GENE MOTYKA
being first duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

(s) Gene Motyka

(The underlined [italicized] portions are those portions which were filled in on the complaint form.)

[1] The appellant's objection is that the complaint does not state "the county or district in which the offense is alleged to have been committed." Article 2, sec. 9 Ill. Constitution, SHA. The place of the offense is alleged as 900 S. Winchester rather than Cook County. It has not bee aruged at any point during this appeal that the offense did not take place in Cook County, the only point made being that the appellant had a Constitutional right to have the complaint allege Cook County. It is argued that the fact the words Cook County appear on the form cannot cure the defect because a caption cannot be used as part of the complaint. The case is brought to us on the common law record; we do not have a transcript of the proceedings at the trial. Nothing appears in the record, nor has any point been made here that there was an objection as to venue stated in the complaint in the court below. The question has been raised for the first time on this appeal.

We do not think that the complaint shows a substantial deficiency so as to make the judgment of conviction void. People v. Pride, 16 Ill. 2d 82, 156 N.E. 2d 551 (1959) held that venue was sufficiently estbblished when the street address was shown where the conclusion could be reached with no reasonable doubt that the offense occurred in Cook County.

"The statement attributed to
Mr. Justice Holmes that judges need

not be more naive than other men is particularly appropriate. They should use their common sense, common observation and general knowledge in considering evidence and drawing the proper inference from it. What is obvious to the layman should not be confounded by labeling it indefinite to the courts.

"When a person is within a city or village and is talking with another person within the same city of village, he will describe a location within the said city or village by merely saying at the corner of such and such streets, or within the so-many-hundred block of such street or give the exact street and number. The person who hears this incomplete address knows to what city and State the speaker is referring, since this is the common way (though not the best way) to describe locations. If the location is in some other city or village than where the speaker and listener are, the name of that other city or village will often be given for clarification. This incomplete manner of description is also common when referring to a city or village. Thus, when persons in and around Springfield, Illinois, speak to each other of Springfield they naturally mean Springfield,

Illinois; if they mean Massachusetts or Missouri, they say Springfield, Massachusetts, or Springfield, Missouri.

"This method of describing locations is not used solely by the man on the street. Our city newspaper when reporting an occurrence within the city of publication merely state the street and street number where it happened. If the occurrance [sic] was outside the city, the city wherein it happened is named either in the article or the date line. There is no reasonable doubt in anyone's mind who reads the newspaper just where the occurrence took place. Local television news-broadcasters use a like description in giving locations, and business men sponsoring local television programs will often so identify the location of their business establishment.

"Describing a location by street and number is so much a part of our every day life that it cannot be ignored. A witness's testimony should not be considered in a vacuum divorced from our general knowledge as to the manner in which things are said. And, so, common experience dictates that a witness testifying in Chicago, when

speaking of 8900 S. Anthony Avenue, is speaking of 899 S. Anthony Avenue in Chicago, Cook County, Illinois, although there very well may be an 8900 S. Anthony Avenue in some city other than Chicago, in some county other than Cook and in some State other than Illinois." People v. Prida, supra, pp. 77-78 of the Illinois Reporter, pp. 554-555 of the regional reporter.

While it is true that the Pride decision deals with the proof of venue at a trial, rather than an allegation of venue in a complaint, the reasoning is applicable in either instance. The caption of the complaint shows that it was sworn to in Cook County. It is only fair to assume that a person swearing to a complaint in Cook County and speaking of 900 S. Winchester, is speaking of 900 S. Winchester, in Cook County.

We also point out that there was no question raised before this appeal was taken concerning the location of 900 S. Winchester. The purpose of requiring exactness in a complaint or indictment is to allow the defendant to prepare adequately for trial. There appears not an iota of evidence indicating that this appellant was in any way inconvenienced by the omission of Cook County from that portion of the complaint where the address was filled in.

[2] There is no doubt that the elements of a crime were properly alleged, the only complaint here being that venue was not correctly set forth. Our Supreme Court in People v. Blanchett, 33 Ill. 2d 527, 212 N.E. 2d 97, discussed what was necessary to allege an offense under the new Code of Criminal Procedure and noted, "It is also indicated that such matters as the time and place of the offense are 'subsidiary matters', which are to be distinguished from the substantive matter of charging an offense." People v. Blanchett, supra, 212 N.E. 2d at p. 100. We believe that as long as the offense was properly charged, and as long as no question was raised in the court below concerning the complaint, it is unnecesarry to reverse the judgment on appeal.

[3-6] The defendant did not bring a report of proceedings. A reviewing court will indulge every presumption in favor of the judgment and that the omitted part of the record (report of proceeding) contains that which justified the action of the court. In the absence of the report of proceedings we assume that the testimony showed that the offense was committed in Cook County, that the address given in the information, 900 S. Winchester Avenue was within the jurisdiction of the court, and that the evidence supported the finding and judgment that the defendant was guilty of the offense. The nature and element of the offense were properly charged in the information as required by Section 111-3 of the Code of Criminal Procedure.

This section also requires that the information state the time and place of the offense as definitely as can be done. Article 114 requires a written motion to dismiss of the defendant made prior to the trial on the ground that the county was an improper place of trial. Sections 116-1 and 116-2 require a written motion for a new trial or in arrest of judgment. The defendant did not make a motion prior to the trial or subsequent to the trial. Had he made a motion raising the point he now urges the State's Attorney would have had an opportunity to amend the information. Not having done so when he should have done so the defendant cannot complain and he waived the point. He was tried before a judge of the county in which the offense was alleged to have been committed. Therefore his constitutional rights were not violated. We think that had the motion been made in due time it would have been the duty of the court to sustain the motion; at which time undoubtedly the State's Attorney would have moved to amend by stating the county.

We also note the cases cited by the appellant for the proposition that a caption cannot be read as part of the complaint are distinguishable from the case at bar. People v. Shaw, 300 Ill. 451, 133 N.E. 208 (1921) dealt with a situation where the caption of an indictment gave the date as 1901 while the body of the indictment gave the true date, 1920. The court rules that as between the two dates, the date

in the body of the indictment controlled. In People v. Sellers, 30 Ill. 2d 221, 196 N.E. 2d 481 (1964), the Supreme Court found that a caption "Burglary, etc." was not too indefinite where the charges were particularized in the body of the indictment. In George v. People, 167 Ill. 477, 47 N.E. 741, (1897) there was an error in the caption which stated that the case appeared in the March 1806 term rather than 1896. The court held that the body of the indictment controlled over the caption.

[7] We have found no case which has held that the venue requirement cannot be derived from the caption where there is no conflict between the caption of an indictment or complaint and the body. It would seem, therefore, that if there is in fact a requirement that the county of the offense be alleged in the complaint and that such a defect is not waivable, then the county is supplied by the caption. The words Cook County appear four times on the complaint. We see no reason to pretend that they are not there.

We are aware that this opinion is not in accord with that handed down by another division of this district, People v. Hill, Gen. No. 50343, Ill. App. , 216 N.E. 2d 212, filed February 3, 1966, but for the reasons set forth above, we find ourselves unable to agree with our brethren on this matter. We feel the judgment should be affirmed.

Judgment affirmed.

BURKE, J., concurs.

LYONS, Justice (dissenting);

The only issue to be decided in the instant case is whether the failure to state a City, County or State, in the body of the complaint constitutes a jurisdictional defect. I am of the opinion it does. Because it is a jurisdictional defect, it cannot be waived by defendant and may be brought on appeal for the first time. I feel that People v. Hill, Gen. No. 50343, Ill. App., 216 N. E. 2d 212, filed February 3, 1966, cited in the majority opinion, is dispostive of the remaining issues and for the reasons given in that case, dissent from the result reached by the majority.

ON PETITION FOR REHEARING

BRYANT, Presiding Justice.

The appellant has argued both in his original appeal and in his petition for rehearing that the complaint was filed in the Municipal Court of Chicago. The new judicial article which went into effect at the beginning of the year 1964, makes no provision for a Municipal Court of Chicago. The complaint in this matter was filed January 7, 1965--over a year after the Municipal Court was abolished. As the complaint shows, it was filed in the Circuit Court of Cook County.

We have read the appellant's petition for rehearing and considered the arguments

contained therein. We adhere to our original opinion and affirm the judgment of the Circuit Court.

Petition denied.

Judgment affirmed.

BURKE, J., concurs.

LYONS, J., dissents.

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PEOPLE of the State of Illinois,
Plaintiff-Appellee,
v.
Clarence HILL, Defendant-Appellant.

Gen. No. 50343.

68 Ill. App. 2d 369

216 N.E. 2d 212

Appellate Court of Illinois
First District, Third Division
Feb. 3, 1966.

DEMPSEY, Justice.

After a nonjury trial in the First Municipal District of the Circuit Court of Cook County the defendant, Clarence Hill, who was not represented by counsel, was found guilty of theft "in manner and form as charged in the complaint herein" and was sentenced to the House of Correction for six months. The defendant asserts that his conviction should be reversed because he was tried under a void complaint and by a court which lacks jurisdiction.

The complaint was drawn on a quasicriminal form but was in reality a criminal complaint which charged that Clarence Hill,

"* * * on or about 16 August-64 at 4646 S. Halsted St. committed the offense of theft, in that he knowingly obtained unauthorized control over

4 Mens Shirts value of $6. 78 and 4 Mens Sweaters value of $39. 48 and 6 Boxes of Handerchiefs value of $5. 00- total value--$51. 26 the property of Community Discount Store at 4646 S. Halsted St. intending to deprive the owner permanently of the use and benefit of said property in violation of Chapter 38, Section 16-1a1, of the Municipal Code of the City of Chicago."

[1-5] The complaint is defective in several particulars, some of which go far beyond formal technicalities or niceties of pleadings. The most flagrant defect is that venue is not alleged. The complaint does not say in what city, county or state the offense was committed. A defendant has a constitutional right to be tried in the county in which the offense is alleged to have been committed. Constitution of Illinois, art. II, sec. 9, S. H. A. It follows that if there is no allegation of the county in which the offense took place the jurisdiction of the court is not established. The complaint was filed in the Circuit Court of Cook County, and it is essential that the complaint show on its face that the offense took place in Cook County. People v. Petropoulous, 59 Ill. App. 2d 298, 208 N. E. 2d 323 (1965). An address, such as "4646 S. Halsted St.," and nothing more, is insufficient for this purpose. A court cannot conjecture that it is the only court that has such an address within its jurisdiction. In People v. Strong, 363 Ill. 602, 2 N. E. 2d 942 (1936), it was said that venue in an indictment "must be stated with such precision that the court can see that a criminal offense has been committed within its jurisdiction." In

People v. Powell, 353 Ill. 582, 187 N.E. 419 (1933), the court said: "Venue is not a matter of form--it is a matter of substance. It is jurisdictional. It is absolutely essential that the venue of the alleged offense be stated in clear, aprt and concise terms by the indictment." Our courts have long made it clear that it is essential to allege the couny in which the crime took place. It has been held that venue may be proved by circumstantial evidence. (People v. Allen, 413 Ill. 69, 107 N.E. 2d 826 (1952)) and that venue may sometimes be proved by testimony concerning a street address (People v. Pride, 16 Ill. 2d 82, 156 N.E.2d 551 (1959)) but both of these cases unequivocally state that the charge that a crime was committed in a particular county is a material averment. In People v. Williams, 233 Ill. App. 53 (1924) an information charged that the offense was committed in the City of Chicago. The Appellate Court held that this was sufficient because the court would take judicial notice of the fact that Chicago is in Cook County. However, no case has been called to our attention which intimates that venue may be alleged by only a street address. Nor has any case been cited which holds that the printed caption on an indictment or complaint is an averment of where the offense was committed. A caption which states the place where the court is sitting cannot be substituted for essential allegations. For example, it has been held that captions are not to be considered in determing whether the indictment states the elements of the offense or whether the prosecution of the offense is within the statute of

limitations. People v. Sellers, 30 Ill. 2d 221, 196, N.E. 2d 481 (1964); People v. Shaw , 300 Ill. 451, 133 N. E. 208 (1921).

[6, 7] The same certainty of allegation is required in an information or a criminal complaint as in an indictment. People v. Ring, 275 Ill. App. 214 (1935). The failure of the complaint to allege commission of the offense within the county over which which the trial court had jurisdiction would have been reason for a motion to dismiss (Ill. Rev. Stat., 1963, ch. 38, sec. 114-1 (a) (6)) and would have been cause for arresting the judgment (ch. 38, sec. 116-2 (b) (2)); and it is a substantive deficiency which makes the judgment of conviction void.

[8, 9[The complaint fails to allege that the theft was from an entity legally capable of owning property. In an indictment for theft the ownership of the property allegedly stolen is a necessary averment. People v. Cohen, 352 Ill. 380, 185 N. E. 608, 88 A.L.R. 481 (1933); People v. Smith, 341 Ill. 649, 173 N.E. 814 (1930). The complaint avers that the property stolen belonged to a store --the Community Discount Store. If the Community Discout Store was a corporation, its corporate existence should have been alleged. People v. Brander, 244 Ill. 26, 91 N.E. 59 (1910). If the store was not an entity capable of owning property, the ownership should have been alleged in the individual or individuals who owned the property.

[10-13] In charging that the theft was in violation of chapter 38, section 16-1a1 of the Municipal Code of Chicago, the complaint not only fails to cite the correct statute but cites a nonexistent ordinance. Chapter 38 of the Municipal Code of Chicago deals with harbors, wharfs, docks and bridges. It does not contain a section 16-1a1, and no section of chapter 38 and no other section of the Chicago Municipal Code describes the offense of theft or prescribes penalties for its commission. The intention obviously was to charge the defendant with violation of section 16-1 (a) (1) of the Criminal Code of 1961. In not doing so, the complaint contravenes section 111-3 (a) (2) of the 1963 Criminal Code of Procedure which provides:

> "(a) A charge shall be in writing and allege the commission of an offense by:
>
> (2) Citing the statutory provision alleged to have been violated * * *."

Failure to cite the statute or the correct provision thereof is error, but in view of the description of the offense given in the complaint, is not an error which, in itself, vitiates the complaint. The complaint describes the offense of theft by charging that the defendant knowingly obtained unauthorized control over the property of the owner and intended to deprive the owner permanently of the use and benefit of the property. Ill. Rev. Stat., 1963, ch. 38, sec. 16-1 (a) (1). The complaint adequately informed the defendant of the

nature and cause and the elements of the charge against him so that he knew precisely what he was called upon to meet, and thereby fulfilled the requirements of article II, section 9 of the Constitution and of section 111-3 (a) (3) of the 1963 Code of Criminal Procedure. People v. Burns, 403 Ill. 407, 86 N.E. 2d 197 (1949); People v. Brown, 336 Ill. 257, 168 N.E. 289 (1929). Failure to cite the proper statutory provision alleged to have been violated is not a ground for dismissal under section 114-1 (a) or for arresting judgment under section 116-2 (b) of Chapter 38, and cannot be equated with a failure of the charge to state an offense. People v. Bridges, Ill. App., 214 N.E. 2d 539 filed January 24, 1966. Because this complaint states an offense, it is not vulnerable either to a motion to dismiss under section 114-1 (a) (8) or to a motion in arrest of judgment under section 116-2 (b) (1) of chapter 38, and it is not subject to the attack that the conviction based upon it is void. People v. Bridges, Ill. App., 214 N.E. 2d 539, filed January 27, 1965.

[14-18] A lesser shortcoming of the complaint is the date given for the offense; "16 August -64." The date, like the inaccurate statutory citation, points up the carelessness with which this complaint is drawn. The defendant argues that since the offense is said to have taken place in the year 64, the prosecution is barred because it is not within the time fixed by law for the prosecution of theft of property less than $150.00. If an offense is laid on an impossible date or a date beyond the

statute of limitations, a complaint is defective. People v. Weinstein, 255 Ill. 530, 99 N.E. 539 (1912). However, we regard the date "16 August -64" as incomplete rather than as a decisive error. A date beyond the state of limitations is reason for the dismissal of a complaint under section 114-1 (a) (2) of the 1963 Criminal Code of Procedure which deals with motions to dismiss predicated upon prosecutions being barred by section 3-5 (b) (general limitation provision) of the Criminal Code of 1961. But if a motion to dismiss is not made prior to trial and within a reasonable time after arraignment, it is waived. Ill. Rev. Stat., 1963, ch. 38, sec. 114-1 (b). Moreover, an indefinite or questionable date would support a motion for a bill of particulars. Ill. Rev. Stat., 1963, ch 38, sec. 114-2 (a).

[19] If a criminal complaint is void it can be challenged at any time and if need be, for the first time in a court of review. People v. Green, 368 Ill. 242, 13 N.E. 2d 278, 115 A.L.R. 348 (1938); People v. Stringfield, 37 Ill. App. 2d 344, 185 N.E. 2d 381 (1962). In People v. Fore, 384 Ill. 455, 51 N.E. 2d 548 (1943) the court said that where an indictment does not charge an offense the judgment of conviction must be reversed notwithstanding the fact that the point was not raised in the trial court,

> " * * * as no waiver or consent by the defendant to a criminal prosecution can confer jurisdiction or authorize his conviction in the absence of an accusation charging

him with a violation of the criminal law."

Because of the errors related, the judgment of conviction is reversed.

Reversed.

SULLIVAN, P. J., and SCHWARTZ, J., concur.